84-658

CASE NO.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS, CLERK

IN THE UNITED STATES SUPREME COURT

OCTOBER 1984 TERM

In re:	Bankruptcy
	No. 81-2593
LEWIS W. SHURTLEFF, INC., and FRONTIER PROPERTIES, INC.	So. Calif.
	CA# 83-6104
Debtors.	So. Calif.
THOMAS D. ELLIOTT, etc., et al.,	DC# C82-1246
	So. Calif.
Appellees,	
vs.	CA# 83-6105
	So. Calif.
FRONTIER PROPERTIES LP 123, etc., et al.,	
	DC# C82-3048
Appellants.	So. Calif.
FRONTIER PROPERTIES LP 101, etc., et al.,	CA# 83-6148
	So. Calif.
Appellants,	
vs.	DC# SC82-1377
	So. Calif.
LEWIS WARREN SHURTLEFF, et al.,	
	CA# 83-6160
Appellees,	So. Calif.
STANDING COMMITTEE ON DISCIPLINE, etc.,	DC# CV 83-855
	So. Calif.
Appellees,	
vs.	
JOHN M. ROSS,	
Appellant.	

On Appeal From The United States
Court Of Appeal For The Ninth Circuit

JURISDICTIONAL STATEMENT

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11 pp

I

ISSUES PRESENTED

ISSUE I: The first primary issue is whether or not a partnership agreement is an executory contract within the meaning of the Bankruptcy Act of 1978; and, if it is, does the bankruptcy trustee who fails and refuses to accept a partnership agreement succeed as a new or substitute general partner for the partnership when the partnership and its limited partners have not agreed or acquiesced to the trustee acting in such a capacity. This issue involves the federal question of whether or not it is Constitutionality permissible to modify contractual and business rights of partners to dictate management of a business when a partner who is a business manager files a bankruptcy petition, but the business itself has not filed bankruptcy. This issue pertains to jurisdiction of bankruptcy

courts over businesses in which a debtor claims a minority interest. An ancillary issue is whether or not partners may act as if a partnership agreement has been rejected by a trustee who fails and refuses to accept the agreement with the result that there may be no violation of the automatic stay of the Bankruptcy Act for seeking to nominate a new or substitute general partner or otherwise seeking to take over control of property that is prima facie owned by a partnership from a bankrupt general partner. Another ancillary issue is whether or not a bankruptcy court may order that a bankruptcy trustee may act in the capacity of a general partner without having accepted the partnership agreement therefor when the partnership is not in bankruptcy and when the contract at issue (i.e. the partnership agreement) provides that the party the subject of the contract is to act in

a responsible position (i.e. as a general partner for a partnership). Practically put, the issue is whether or not a bankruptcy court may allow a trustee to act as a general partner for a limited partnership without also requiring that the trustee accept the burdens of being a general partner for a partnership. Appellants contend that this issue is answered by 11 USC 365(c) which prohibits a bankruptcy trustee from accepting a personal service contract.

ISSUE II: The second major issue in this case is whether a party be prevented by the Bankruptcy Act from filing suit in a bankruptcy court or the district court connected with the administration of a bankruptcy case, particularly, for reclamation of property claimed to have been wrongfully taken by a bankruptcy trustee, without first obtaining an order from the bankruptcy court relieving the plaintiff

from the automatic stay provided by 11 USC 362; or is such relief from said stay implicit? The Constitutional question is whether or not a statute enacted by Congress which contains such a restriction, or which is interpreted or applied so as to contain such a restriction, is a violation of the right to due process of law guaranteed by the Fifth Amendment? An ancillary issue is whether or not a bankruptcy court may prevent actions by the prima facie owners of property to reclaim their property while a bankruptcy trustee liquidates that property without consent of the prima facie owner? Another Constitutional question if whether or not the procedure adopted by the bankruptcy court and the district court of permitting a bankruptcy trustee to sell property **prior to filing an action** to avoid the deed or other transfer of the property is a form of **inverse condemnation**? Ancillary issues

are (1) whether or not Congress has authorized or may authorize such procedure through the Bankruptcy clause, (2) whether or not such procedure is a violation of due process, and (3) whether or not such a procedure violates the Condemnation clause as a taking for a private purpose? If it is determined that any action involved in this case is permissible, may any party file a class action joining all interested persons as parties plaintiff?

ISSUE III: Presuming that a reclamation action is permitted, is a trustee required to file all avoidance actions that he or she may have as mandatory counterclaims? If it is correct that the trustee must file such counterclaims, is the trustee in this case now precluded from doing so in these actions because of 11 USC 546(a)?

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ISSUE IV: Prior to commencement of an adversary action dictated by Bankruptcy Rule 701 for the alleged power to avoid a transfer, does a bankruptcy court have jurisdiction over property which is prima facie not owned by a debtor and in which the debtor does not own an interest? Constitutional questions are (1) whether or not Congress may allow a bankruptcy court to exercise jurisdiction over property that does not belong to a debtor or in which a debtor has no interest; (2) whether or not it is a violation of due process for a court to exercise impending jurisdiction before it is invoked; and (3) whether or not it is a violation of due process for a court to act when it does not have jurisdiction. An ancillary issue is whether or not the charging interest of a partner is an interest in property or merely a right to money from a partnership? Another issue is whether

or not Congress or the bankruptcy courts may convert the charging interest of a partner created as a matter of State law into a property interest in partnership property? Another issue is whether or not Congress intended to convert a partnership charging interest into an interest in partnership property?

ISSUE V: Presuming that a bankruptcy trustee has not filed an avoidance action as required by 11 USC 546(a) and Bankruptcy Rule 701, may a bankruptcy court order that the prima facie owner of property is required to post a bond in order to prevent the sale of property of such prima facie owner? Does the failure to post the bond dictated by a bankruptcy court or any appellate court in such circumstances preclude an action against the buyer and the trustee or an appeal of the order for the sale of such property because of 11 USC 363(m)?

ISSUE VI: May a party to a bankruptcy proceeding file an action pursuant to 11 USC 523 and 11 USC 1141(d)(2) in a bankruptcy court without first obtaining leave to do so from a bankruptcy court and without securing relief from the automatic stay of the Bankruptcy Act?

ISSUE VII: Is an order for the sale of property by a bankruptcy court appellable under the collateral order doctrine when the subject property is prima facie not owned by a debtor?

ISSUE VIII: May a bankruptcy trustee, his counsel, and all persons claimed to be acting in concert with them be sued and held liable for damages for improper seizure and liquidation of property not belonging to a debtor?

ISSUE IX: Prior to the decision in **Northern Pipeline Construction Co. v. Marathon Pipeline Co. etc.** 458 U.S. 50 (1981), may private rights claims be

attached to bankruptcy reclamation and 11 USC 523 actions as ancillary actions?

ISSUE X: After the decision in **Northern Pipeline, etc.**, supra, may the parties to private rights actions that were filed in the bankruptcy court file new actions in the district court as to private rights claims although such actions are already pending in the bankruptcy court?

ISSUE XI: When a respondent in an attorney disciplinary proceeding produces evidence that certain alleged standards of professional conduct are not actually adopted or enforced, or that they are selectively enforced, does the petitioner then carry a burden of proof to establish what standards of professional conduct are in force and that they have been violated by the respondent? If the answer to this issue is affirmative, what evidence is required to establish the standards of professional conduct in disciplinary pro-

ceedings; and did the petitioners in this case satisfy that burden of proof?

ISSUE XII: Is it proper for a court of appeal to dismiss appeals on important issues of fact and law when the opening briefs in the appeals are filed late? What are the standards for dismissal of appeals when opening briefs are filed late? What are the standards for dismissal of an appeal when an opening brief on appeal has been filed within the time set by a court order, but it is late according to rules of court? Is the order of the circuit court in this case for dismissals, discipline, and sanctions proper, or should it be modified?

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II

PARTIES TO THIS APPEAL

APPELLANTS: Frontier Properties LP/123/ Colonial Arms 1981, a partnership, Frontier Properties /LP/101/ Summerfield/Arms/ 79, a partnership, Frontier Properties/LP/ 111/ Shurtleff Financial Center, a partnership, Frontier Properties/LP/102/Meadow Glen Arms/79, a partnership, Frontier Properties /LP/119 Morton Meadow Arms/80, a partnership, Lemon Grove Arms Properties, a partnership, Lexington Arms Properties, a partnership, Broadway Arms Properties, a partnership, M. Irene Galarneau, Anthony S. Vigeon, Helena G. Vigeon, J. Avril Jesperson, Vincent R. Ciruzzi, Canice G. Ciruzzi, Victor V. Schloesser, Lynne D. Schloesser, James D. Bench, Marion G. Bench, David L. Ramsay, Willa D. Ramsay, Irving C. Olson, Florence J. Olson, Anne R. Behenna, Fred D. Snyder, Betty D. Snyder, Warren R. Young, Robert L.

Chambers, Pamela L. Chambers, David H. Dunlap, Beverly B. Dunlap, Watson Lunt, Stephanie Lunt, Howard D. Dunlap, Carol A. Dunlap, Roy Hastings, Edna Hastings, Dennis Jeager, Diann Jeager, William Kerr, Suzanne Kerr, Barber G. Lewis, Shirley Lewis, Michael Pobat, Anthony Terrizzi, Patricia Terrizzi, Emma J. Kemp, William Mahaffey, S. Rutherford, Waddy W. Bacon, Ann E. Bacon, R. Burningham, Rosalie Ross, Maurus W. Beatty, Dee Ann M. Beatty, Erma L. Beidler, Kathleen M. Borer, Steven R. Borer, James M. Caraher, Ann E. Caraher, Berlyn J. Cook, Eleanor R. Cook, Howard T. Ferguson, Rose L. Ferguson, Clarence W. Ginos, Myrna R. Ginos, Douglas L. Hallett, Arlene J. Hallett, James C. Holmes, Jessie M. Holmes, Ernest J. House, Patricia J. House, John B. LaJoie, Mary E. LaJoie, George Navarro, Alma Navarro, Ronald D. Scott, Renee M. Scott, Lana L. Neuman, Edward S. Murawsky, Helen L . Murawsky,

Sterling R. Price, Donald W. Searles, Barbara L. Searles, Carol A. Schloo, Scott R. Stell, Sandy J. Stell, Sonja S. Echt, Nettie Dutky, Arthur C. Thurber, Isabel P. Thurber, William H. Walters, Doris I. Walters, Robert O. Doran, Corrine Doran, Ralph Cordova, Antonia Cordova, Barbara Spatofore, Ronald F. Short, Joan E. Short, Harvey J. Westfall, Helen Westfall, Betty Wojciechowski, Robert E. Sackett, Audrey J. Sackett, Henry F. Chess, Adella Chess, Glenn Vechitto, Sally Vechitto, Joseph W. Actis, Rita M. Actis, Joy H. Crane, Peter R. Mathewson, Penny E. Mathewson, John P. Hennessey, Lorraine M. Hennessey, Charles R. Calhoun, Virgina A. Calhoun, Raymond E. West, Anna Marie Fusco, Louis W. Matthews, Sharon J. Matthews, Clarence P. Broadfoot, Mary A. Broadfoot, and John M. Ross

APPELLEES: Lewis Warren Shurtleff, also known as Lewis W. Shurtleff, Individually and doing business as Lewis W. Shurtleff,

Inc. and Frontier Properties, Inc., Frontier Properties, Inc., a corporation, Lewis W. Shurtleff, Inc., a corporation, Mary Alice Shurtleff, Thomas D. Elliott, Individually and as the Bankruptcy Trustee For Lewis W. Shurtleff, Inc. and Frontier Properties, Inc., Joel C. Estes, Kevin J. Hoyt, Estes & Hoyt, A.P.C., Kenneth W. Kinzel, Judith R. Kinzel, Donald Merkin, Kenman Corporation, Laura Lee Littleton, Cornell Steward & Associates, 535 Broadway a partnership, David A. Lien, Muriel M. Lien, Alan L. Bailey, Coldwell Banker Commercial Realty Services, a corporation or association, First Interstate Bank of California, a banking corporation, Fidelity National Title Insurance Company, a corporation, The United States of America, and Does 1 to 100, Jointly and Severally.

Rule 28.1: The names of parent companies, subsidiaries, or affiliates of corporate parties are not known.

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OFFICIAL & UNOFFICIAL REPORTS

Appellants believe that the following are the only reports in this appeal and that they are unpublished:

CA NOS. 83-6104, 83-6105 & 83-6148:

An Order filed on June 14, 1984.

CA NO. 83-6160:

An Opinion filed on June 25, 1984.

DC NO. C82-1246 & 3048:

An order filed on July 19, 1983.

A Memorandum Of Opinion filed on March 14, 1984 by the bankruptcy court.

DC NO. 83-0855-E(I):

Findings Of Fact And Order and a Judgment entered on August 12, 1983.

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VI

GROUNDS FOR JURISDICTION

(A) Date of judgments appealed:

(1) CA Nos. 83-6104, 83-6105, and 83-6148: June 14, 1984.

(2) CA No. 83-6160: June 25, 1984.

(B) Statutory basis of jurisdiction is believed to be 28 USC 2101(a), (b), & (c).

VII

CONSTITUTION, TREATISES, & STATUTES

A. CONSTITUTION:

Article I, Section 8, Clause (4):

The Congress shall have power: ... (4) To establish ... uniform laws on the subject of bankruptcies throughout the United States."

Amendment 5:

"No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

B. LEADING CASES & TREATISES:

Pearlman v. Reliance Insurance Co., (1962) 371 U.S. 132, 135:

... Property interests ... not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable, mortgages, liens, or simple priority of rights, are of course not part of the bankrupt's property and do not vest in the trustee. The Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors. So here ... this property never became a part of the bankruptcy estate to be admininistered, liquidated, or distributed.

8A C.J.S., Bankruptcy, Section 213, n. 92:

A preference which is within the provisions of the Bankruptcy Act dealing with voidable preferences is voidable only and not void; that is, the preference is valid until avoided, not void until validated.

C. BANKRUPTCY STATUTES AND RULES:

11 USC 362. Automatic Stay: (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of - (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced **before** the commencement of the case under this title, or to recover a claim against the debtor that arose **before** the commencment of the case under this title ... [Emphasis added; i.e. an action under Bankruptcy Rule 701 can not be filed until **after** a bankruptcy petition has been filed.]

11 USC 363. Use, sale ... of property: ... (b) The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business,

property of the estate. ... (f) The trustee may sell property under section (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if - (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 USC 365. Executory contracts ...:

... (c) The trustee may not assume or assign an executory contract or unepired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of

duties, if - (1)(A) applicable law excuses a party, other than the debtor, to such contract from accepting performance from or rendering performance to the trustee or an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (B) such party does not consent to such assumption or assignement ...

11 USC 523. Exceptions to discharge.

11 USC 542. Turnover of property to the estate. (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such

property is of inconsequential value or benefit to the estate. ...

11 USC 543. Turnover of property by custodian. (a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, **property of the debtor**, proceeds of such property, or property of the estate, in the possession, custody, or control of such custodian, except as is necessary to preserve such property. ... [Emphasis added.]

11 USC 544. Trustee as lien creditor and as successor to certain creditors and purchasers. (a) The trustee shall have, as of the commencement of the case, the rights and powers of, or may avoid any transfer **of property of the debtor** or any obligation incurred by the debtor that is voidable by - ... (c) a bona fide purchaser of real property from the

debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists. ...

11 USC 546. Limitation on avoiding powers

11 USC 547. Preferences.

11 USC 548. Fraudulent transfers ...

Bankruptcy Rule 701. Scope Of Rules Of Part VII. The rules of this Part VII govern any **proceeding** instituted by a party before a bankruptcy judge to (a) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief

from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such proceedings shall be known as an adversay proceeding.

Bankruptcy Rule 702. Commencement of Adversary Proceeding. An Adversary proceeding is commenced by filing a complaint with the court.

LEGEISLATIVE HISTORY:

H.R. Rep. 95-595 at 367-68; S. Rep. No. 95-989 at 82 (S. 2266, Cal. No. 1026); 124 Cong. Rec. H11047-117 at H11096 (daily ed. Sept. 28, 1978): ... Section 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third person, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property become property of the estate. If the debtor holds bare legal title or holds property in trust for

another, only those rights which the debtor would have otherwise had emanating from such interest pass to the estate under section 541. ...

STATE LAW ADOPTED BY THE BANKRUPTCY ACT:

California Corporations Code 15509. Rights, powers, and liabilities of general partners. (1) ... general partners have no authority to ...(d) Possess partnership property, or assign their right in specific partnership property for other than a partnership purpose, (e) Admit a person as a general partner, (f) admit a person as a limited partner, unless the right so to do is given in the certificate ...

California Corporations Code 15507. Liability of limited partner. ... (b) a limited partner shall not be deemed to take part in the control of the business by virtue of his possessing or exercising a power, specified in the certificate, to vote upon matters affecting the basic

structure of the partnership, including the following matters or others of a similar nature: (I) Election or removal of general partners. ... [Emphasis added.]

VIII

STATEMENT OF THE CASE

This appeal involves four basic disputes, to wit: (1) the proper procedure for administration of bankruptcy cases under the Bankruptcy Act of 1978, (2) the power of bankruptcy courts over property that is prima facie not owned by a debtor and in which a debtor does not have a property interests, (3) the power, if any, of a bankruptcy trustee to act as a general partner for real estate investment syndicates or to operate a bankrupt debtor as a general partner contrary to the desires of limited partners of the subject partnerships, and (4) the propriety of a certain judgment of attorney discipline.

This case requires an interpretation

of several new statutes contained in the Bankruptcy Act of 1978. Four controlling statutes are (1) 11 USC 362 [the automatic stay], (2) 11 USC 363 [power to sell property not owned by a debtor], (3) 11 USC 365(c) [lack of power to accept executory contracts] and (4) 11 USC 544(a)(3) [the trustee assumes the status of a bona fide purchaser by the filing of a bankruptcy petition]. However, this case does not evolve entirely around 11 USC 544(a)(3). A central issue is who may control property before a bankruptcy trustee commences an avoidance action under the Bankruptcy Act. The bankruptcy trustee, with acquiescence of the bankruptcy court, seized all property that he claimed may be the subject of **prospective** avoidance actions.

This case was commenced by a voluntary Chapter 11 reorganization petition under the Bankruptcy Act of 1978. Counsel for the debtor outlined a plan of reorgan-

ization, but no formal action proceeded as to this outlined plan. Within about 60 days after the debtor had filed its voluntary petition, counsel for a minority of creditors succeeded in being appointed as counsel for a general creditors committee and in having a trustee appointed for the debtor. The trustee, with the concurrence of his counsel and counsel for the general creditors committee, proceeded to close down the debtors' businesses and they terminated all employees except for a bookkeeper and a secretary.

Although these bankruptcy proceedings have been pending for over three years, bankruptcy administrators have not filed a proposed plan for reorganization or liquidation of the debtor. Nor have they sought to convert these proceedings to a Chapter 7 liquidation case. The result is that the creditors in this case have been without any remedy under either the Bankruptcy Act

or State law since the appointment of the trustee. During 1984, the bankruptcy court specifically instructed counsel for the trustee and general creditors committee to submit a plan, but they have continued to fail and refuse to do so.

The trustee sought to act as a substitute general partner for partnerships that the debtors organized prior to their bankruptcy, but the trustee failed and refused to secure consent from partners of the partnerships prior to undertaking such duties. A motion was filed in December of 1981 specifically asking that the trustee accept or reject partnership agreements so that limited partners might know whether or not the trustee sought to undertake the **responsibility** of being a general partner. When the trustee failed and refused to accept partnership agreements and the bankruptcy court failed to set a date by which the trustee was to accept or reject

partnership agreements, limited partners, upon the advise of counsel, took the position that they were without a responsible general partner and could take action to protect their partnership and partnership property. The response by the trustee, his counsel, and counsel for the general creditors committee was that any partner who nominated a new general partner or retained a manager for partnership property was in violation of the automatic stay of the Bankruptcy Act and would be cited for contempt of court and jailed. At the solicitation of the trustee, the bankruptcy court, in open court, threatened about 20 limited partners with criminal contempt proceedings if they took such action. The trustee and his counsel also threatened to initiate criminal contempt proceedings against any person who sought to act as a new general partner or property manager for partnerships; and

they actually prosecuted criminal contempt proceedings against a person who asserted that property to which a partnership had title belonged to the partnership and that the subject partnership was entitled to exclusive possession and control of the subject property because the trustee had not initiated any adversary action under Bankruptcy Rules or the Bankruptcy Act to avoid the transfer of the property to the subject partnership.

The trustee then sought permission from the bankruptcy court to sell the property that was prima facie owned by the partnerships; however the trustee failed to commence an adversary action. It seems that the bankruptcy court interpreted the term "proceeding" to mean a motion and it sought to authorize sales of property that were the subject of impending avoidance actions by motions by the trustee.

Partnerships and limited partners

sought to file adversary actions and to cause the trustee to file mandatory counter claims under Rule 13 of the Federal Rules of Civil Procedure (which is adopted by bankruptcy rules). The response of the trustee and his counsel was that it was necessary to secure leave from the bankruptcy court to file these adversary proceedings; and, therefore, the plaintiffs had not stated and could not state a claim upon which relief could be granted.

In January 1983, after **Northern Pipeline Construction Company v. Marathon Pipe Line Co., et al.**, 458 U.S. 50 (1982), went into effect, partnerships and partners sought to proceed with private rights claims in the district court. These suits were also dismissed. Appeals to the Bankruptcy Appellate Panels resulted in demands by the trustee and opposing counsel for bonds in order to prevent the sale of alleged partnership property.

Counsel for partnerships and partners argued that any bonds that might be required should be filed by the trustee because he had not yet proved any right to avoidance. Courts below ordered that partnerships and their limited partners were required to post bonds to prevent the sale of property to which they held legal title. Supersedeas bonds were not posted. Opposing counsel argues that appeals are moot pursuant to 11 USC 363(m). A rebuttal to this argument is that 11 USC 363 pertains to the debtors' property and the trustee had not commenced avoidance actions or secured any judgment altering the prima facie title of property which was in partnerships.

Appeals to the Circuit Court proceeded in a piece-meal manner. The court of appeals ordered that counsel for the appellants was permitted to file his tardy opening brief. Rather than to file their

appellees' briefs, opposing counsel moved to dismiss appeals in the Circuit Court because opening briefs were tardy; and the Circuit Court dismissed pending appeals.

In addition to continuing threats of contempt proceedings, opposing counsel initiated attorney discipline proceedings against counsel for limited partners and partnerships. These proceedings resulted in a judgment suspending the ability of counsel for partners and partnerships to practice law in the district court and the bankruptcy court for five years. Evidence during disciplinary proceedings included proof that opposing counsel engaged in unethical conduct and that the district court had not initiated disciplinary proceedings against them. It has been argued that these facts created a burden for the petitioner to prove what constitutes the actual standards of professional conduct of the local bar and that the

respondent violated those standards. The petitioner failed to present any evidence of what the local bar actually considers to be standards for professional conduct. It is submitted that evidence established that applicable rules are enforced in a selective manner resulting in denial of due process and unequal protection of the law. The above arguments were ignored by the courts below.

X

REASONS TO HEAR CASE

This case involves claims between a bankrupt general partner of various limited partnerships and limited partners. The general partner filed a reorganization petition under the Bankruptcy Act of 1978. Limited partnerships have not filed bankruptcy petitions and are merely claimants of property. The debtors' trustee claims a prospective power to avoid transfer of the subject property of partnerships.

Hearing in this case is warranted because the court of appeals has issued a decision on a federal question that is contrary to the law in all circuits as to the power of federal courts to act; or it has departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower courts, as to call for an exercies of this Court's power of supervision.

Particularly, this case involves the procedure for administration of bankruptcy cases pursuant to the Bankruptcy Act of 1978. Various proponents of this statute seek to interpret it in order to expand the power of the bankruptcy court in a manner never seen before.

The courts below have permitted a bankruptcy trustee to seize and sell property that prima facie is not owned by a debtor without the need to file an adversary action dictated by Bankruptcy

Rule 701, et seq., which is equivalent to Rule 3 of the Federal Rules of Civil Procedure. Rule 3 states that "[a] civil action is commenced by the filing of a complaint with the court." The consequence of this statute seems to be black letter law. At **P.K. Family Restaurant v. Internal Revenue Service**, (Ohio, 1982) 535 F. Supp. 1223, the court states: " ... (1) A civil action is commenced with the filing of a complaint. Rule 3, Federal Rules of Civil Procedure. Absent a complaint, this Court lacks jurisdiction to entertain plaintiff's petition for injunctive relief."

An offer of proof is made that the district court stated in August 1984 that it would not allow trial of bankruptcy avoidance actions or appeals on related issues to the United States Supreme Court.

Attention is directed to the fact that Bankruptcy Rule 701 requires that a bankruptcy trustee file adversary actions

to seek to avoid transfers of property from a debtor to others, or to sell any property that is claimed to not be owned by a debtor. The bankruptcy and district courts seek to evade this rule. Thus, the Constitutional question is whether or not there is due process of law when a court acts before its jurisdiction is invoked.

Another substantial question relating to the proper administration of cases pursuant to the Bankruptcy Act of 1978 is that the bankruptcy administrators in this case have not proposed or secured approval of a reorganization or liquidation plan although this case is over three (3) years old. An offer of proof is made that there are about 300 persons (limited partners) comprising a class of claimants and it appears that about 120 of these people have moved, left the jurisdiction of the bankruptcy court, and can not be contacted by mail. Thus, these 120 people are

deprived of the legal right to vote on any proposed plan for the administration of this bankruptcy case because of delay by the trustee and other administrators. It is urged that the right of interested parties to vote on proposed administration of a bankruptcy estate is a substantial civil and property right that should be protected by this Court.

The trustee and bankruptcy court have sought to liquidate property that is prima facie not owned by a debtor while at the same time preventing prima facie owners of property from voting on whether they want to reorganize the debtor or liqidate. This procedure deprives all interested parties in bankruptcy proceedings of their statutory rights to approve a plan of reorganization or liquidation of a debtor and it summarily places decisions concerning such matters in the hands of a bankruptcy court and trustee. Since this

procedure is contrary to statute, it is urged that it is a substantial denial of due process of law.

Also, the bankruptcy court and trustee have imposed the automatic stay of the Bankruptcy Act to prevent claimants of the property that the trustee seized from proceedings with actions to reclaim that property. It is urged that this procedure, coupled with the apparent deliberate delay in administration and forced liquidations of property, is a blatant violation of due process of law; and it violates the statutory scheme of bankruptcy administration.

The trustee filed avoidance actions related to this appeal in September 1983, but he has taken no action to try those cases except for one case. The trustee lost that trial, but the judgment therein remains on appeal. The significance of this circumstance is that it emphasizes the inadequacy of permitting a trustee to

sell property prior to completion of avoidance actions. Particularly, district courts which appoint bankruptcy trustees are placed under substantial pressure to rule in a trustee's favor in order to prevent a trustee from incurring liability for wrongful liquidation of property that is not owned by a debtor. It is urged that this circumstance is a practical reason for restricting bankruptcy administration proposed by the lower courts.

Further departure from a usual course of judicial proceedings results from the fact that lower courts made and continue to make threats against persons who are deemed to be interfering with the manner in which lower courts want to administer bankruptcy cases. These threats include a continuing threat to prosecute for alleged criminal contempt against persons who assert their rights as partners in respect to property that is prima facie partner-

ship property. It is urged that threats of this sort, coupled with the administration in this case, violates the Fifth Amendment provision that property may not be taken except for a public purpose; and then only upon payment of just compensation.

Further proof of substantial departure from a usual course of judicial proceedings is evidenced by Exhibits "A" and "B" on the next pages of this petition. In Exhibit "A", the district court states that counsel for the appellants is suspended from the practice of law because he has been convicted of a felony (forgery); but, in Exhibit "B", the district court admits that counsel has never been convicted of a felony. The significance of this correspondence is that suspension of counsel for the appellants is an issue in this appeal. Further, Exhibit "A" was received immediately after it was made known that the within appeal would be filed. Thus,

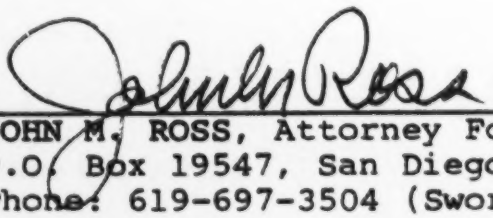
Exhibit "A" is viewed as a threat that counsel should not file this appeal.

. . . .

Date: September 8, 1984

. . . .

. . . .



JOHN M. ROSS, Attorney For Appellants
P.O. Box 19547, San Diego, CA 92119
Phone: 619-697-3504 (Sworn In 4/1/74)

A P P E N D I X

EXHIBIT A

United States District Court

Southern District of California

940 Front Street

San Diego, CA 92189

Chambers of

Gordon Thompson, Jr.

Chief Judge August 2, 1984

John M. Ross

1364 Pillsbury Lane

El Cajon, CA 92020

Dear Mr. Ross:

It has come to my attention that you were convicted of a felony in violation of California Penal Code 470 on November 19, 1982 in the United States District Court for the Southern District of California.

General Order No.. 276 of the United States District Court for the Southern District of California provides in part:

"Any attorney admitted to practice in this court, pursuant to Rule 110-3 of the

local rules, who is convicted of a felony shall immediately be suspended from practice before this court.

Upon a felony conviction becoming final, he shall be disbarred.

The disbarred attorney may make a motion in this court within sixty days after the date of his disbarment for an order of modification of the disbarment order as justice may require."

Pursuant to this order, you are hereby suspended from the practice of law in the Southern District of California. If you have any cases pending in this court, would you please provide substitute counsel for your clients.

Sincerely,

/s/ Gordon Thompson, Jr., Chief Judge

GTJr:sd

cc: Wiliam Luddy, Clerk US District Court
William Parker, Clerk Bankruptcy Court

EXHIBIT B

United States District Court

Southern District of California

940 Front Street

San Diego, CA 92189

Chambers of August 8, 1984

Gordon Thompson, Jr.

Chief Judge

Mr. John M. Ross

1364 Pillsbury Lane

El Cajon, CA 92020

Dear Mr. Ross:

The court received and reviewed your letter of August 4, 1984 which brings to light a clerical error on the part of the district court. No form letter setting forth grounds for suspension should have been sent to you since you have already been suspended by order of the Honorable William B. Enright. That order was recently affirmed by the Ninth Circuit. This court's letter of August 2, 1984 is there-

fore nullified.

As in the case of others who were also mistakenly sent the August 2, 1984 letter, this court has no reason to believe that you were convicted of violating California Penal Code 470 or, for that matter, that you were convicted of any felony. The court hereby expressly withdraws any and all suggestion of the existence of a felony conviction.

Sincerly,

/s/ Gordon Thompson, Jr.
Chief Judge, United States District Court

GTJr:nb

cc: William Luddy, Clerk US District Court
William Parker, Clerk US Bankruptcy Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	) Filed Jun 14
	) 1984 Phillip
LEWIS W. SHURTLEFF, INC.	) B. Winberry
and	) Clerk, U.S.
FRONTIER PROPERTIES, INC.,	) Court of
	) Appeals
Debtors.	)
	) No. 83-6104
THOMAS W. ELLIOTT, etc., et al.,	)
	) DC# C82-1246
Appellees,	) -K11 HBT
vs.	) Southern
	) California
FRONTIER PROPERTIES LP 123, etc.,	)
	)
Appellants,	)
	)
FRONTIER PROPERTIES LP 101, etc., et al.,	) No. 83-6105
	)
Appellants,	) DC# C82-3048
vs.	) -K11 HBT
	) Southern
LEWIS WARREN SHURTLEFF, et al.,	) California
	)
	)
Appellees.	)
	)
FRONTIER PROPERTIES LP 111, etc., et al.,	) No. 83-6148
	)
Appellants,	) DC# SC-82-
vs.	) 1377
	) Southern
DAVID A. LIEN, et al.,	) California
	)
Appellees.	) ORDER

Before: Choy, Skopil and Ferguson,
Circuit Judges

These three appeals from proceedings in bankruptcy court have been negligently handled by John M. Ross, Esquire, counsel for appellants. In all three appeals Mr. Ross has failed to comply with the rules and orders of this court; failed to file the opening briefs, or has submitted late briefs that did not conform with the rules; repeatedly filed untimely motions; and mispresented (sic) to the court actions he would take to prosecute the appeals. In his numerous motions and in response to the court's orders to show cause, he has failed to address his lack of diligence or his noncompliance with the court's rules and orders.

Mr. Ross has been given the opportunity to respond, including the opportunity to present an oral response, to the court's orders to show cause concerning his handling of these cases. Mr. Ross

declined to appear personally before the court. The court has considered Mr. Ross's (sic) written response to the order to show cause issued in connection with appeal 83-6148.

Accordingly, it is ordered that:

(1) A monetary sanction of one thousand dollars ($1,000) is levied as a judgment against John M. Ross, Esq., payable to the Clerk of the Court within twenty-eight (28) days of the entry of this order; and

(2) John M. Ross, Esquire, is suspended from practice before this court for six (6) months from the entry of this order.

It is further ordered that appellees' motions to dismiss appeals 83-6104 and 83-6105 are granted. See 9th Cir.R. 19(b).

Misc. MoCal 12/12/83

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In Re LEWIS W. SHURTLEFF, INC., FRONTIER PROPERTIES, INC., Debtors. Case No. 81-02593-K11 Southern District of California	Filed Jul 14, 1983; Entered Jul 19 1983 Clerk, US District Court Southern District of Cali-fornia
THOMAS D. ELLIOTT, Trustee of Frontier Properties, Inc. Plaintiffs, vs. FRONTIER PROPERTIES LP 123, etc., et al., Defendants.	Adversary Proceed-ing No. C82-1246 -K11
FRONTIER PROPERTIES LP 123, etc. et al., Cross-Complainants, vs. LEWIS WARREN SHURTLEFF, et al., Cross-Defendants.	No. C82-3048-K11
FRONTIER PROPERTIES LP 101, Plaintiffs, vs. LEWIS SHURTLEFF, MARY SHURTLEFF et al., Defendants.	ORDER

The appellants in the above-entitled adversary proceedings seek leave to appeal

or in the alternative appeal as of right from a Memorandum of Opinion dated March 14, 1983. The opinion, among other things, dismissed the complaint in Adversary Proceeding No. C82-3048 and the Cross-Complaint in Adversary Proceedings No. C82-1246; although it is not clear from appellants' moving papers, it appears that it is that part of the opinion from which appellants appeal.

Neither the dismissal of the complaint nor the dismissal of he cross-complaint are appealable as of right in that neither is a final order. With respect to dismissal of the complaint the court did not dismiss the underlying action, with the result that the opinion "is not final and appealable unless special circumstances demonstrate that the trial court found plaintiffs could not save the action by any amendment of the complaint they could reasonably be expected to make. "Proud v. United States, 704 F. 2d

1099, 1100 (9th Cir. 1983). See also State of California v. Harvier, 700 F2d 1217, 1218 (9th Cir. 1983). Upon review of the record and the pleadings, the court is convinced that the exception to the rule of nonappealability has not been satisfied. Thus, the dismissal of the complaint is not appealable as of right.

The dismissal of the cross-complaint cannot be appealed from as of right because it, too, is not a final order. Federal Rule of Civil Procedure 54(b), which is rendered applicable in bankruptcy proceedings by Rule of Bankruptcy Procedure 754, mandates this result. See e.g. Fairview Park Excavating Company, Inc. v. Al Monzo Construction Company, Inc., 560 F2d 1122, 1124 n. 6 (3rd Cir. 1977); 15 Wright, Miller & Cooper, Federal Practice and Procedure 542.

Neither is the opinion appealable under the "collateral order doctrine" set forth in Cohen v. Beneficial Industrial

Loan Corp., 337 U.S. 541 (1949). For an interlocutory order to be reviewable under Cohen, three factors must be present: The order must conclusively determine the disputed questions, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from the final judgment. Matter of Fondiller, No. 81-4435, slip op. at 2553 n. 1 (9th Cir. June 3, 1983). Upon review of the pleadings and record, the court is convinced that the Bankruptcy Court's opinion is not appealable under the above standard.

Appellants also request leave to appeal pursuant to 28 U.S.C. 1334(b) (effective April 1, 1984), which is made effective during the transition period by [section] 405(C)(2) of Title IV of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. Section 1334(b) provides: The district courts for such districts shall

have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

The statute contains no standard by which the district courts are to determine whether leave to appeal from an interlocutory order should be granted. To fill the vacuum, courts and commentators alike have turned to 28 U.S.C. 1292(b), which governs appeals of interlocutory orders from district courts to courts of appeal, as the closest analouge. See e.g. 1 Collier on Bankruptcy, 15th ed. at 3-303; In re White Motor Corp., 25 B.R. 293 (N.D. Ohio 1982); In re Tidewater Group Inc., 22 B.R. 500 (N.D. Georgia 1982); In re Del-Con Cartage & Distribution, 20 B.R. 645 (D. Colo. 1982); First National Bank of Monte- video, Minnesota v. Johnson, 19 B.R. 651.

The court agrees that it is appropriate to apply the statutory standards govern-

ing interlocutory appeals under 28 U.S.C. 1292(b) to requests to appeal an interlocutory order pursuant to 28 U.S.C. 1334(b). As a result, two questions must be answered. Does the appeal raise questions concerning a controlling issue of law, and would immediate appeal serve to advance the ultimate termination of the litigation.

This court has reviewed both the pleadings submitted by the parties and the record, and has determined that both of these questions must be answered in the negative. Thus, Plaintiffs' requests to be allowed to file an interlocutory appeal is denied. Therefore,

IT IS ORDERED that the plaintiff's application for leave to appeal or in the alternative to appeal as of right shall be and hereby is denied in its entirety.

DATED: 7-14-83

/s/ Howard B. Turrentine
United States District Judge

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re LEWIS W. SHURTLEFF, INC., FRONTIER PROPERTIES, INC., Debtors. Case No. C81-02593-K11 Southern District of California	Adversary No. C82-1246-K11 Adversary No. C82-3048-K11
THOMAS D. ELLIOTT, Trustee of Frontier Properties, Inc., Plaintiffs, vs. FRONTIER PROPERTIES LP 123, etc., Defendants.	
FRONTIER PROPERTIES LP 123, etc. et al., Cross-Complainants, vs. LEWIS WARREN SHURTLEFF, et al., et al., Cross-Defendants.	MEMORANDUM OF OPINION
FRONTIER PROPERTIES LP 101, et al., Plaintiffs, vs. LEWIS SHURTLEFF, MARY SHURTLEFF et al., Defendants.	

I

FACTS

On August 17, 1981, Lewis W. Shurtleff, Inc (Bankruptcy No. 81-2593-K11) and Frontier Properties, Inc. (Bankruptcy No. 81-2594-K11) filed petitions for relief pursuant to Chapter 11 of the Bankruptcy Code. The cases were filed in the above-entitled court. Shortly thereafter the two cases were consolidated for administrative purposes. Thomas D. Elliott was appointed trustee in both cases.

Other parties involved in these cases have filed personal bankruptcy cases. On September 27, 1982, Mr. and Mrs. Kinzel filed a Chapter 11 petition (Bankruptcy No. 82-M-02446) in the District of Utah. On October 19, 1982, Mr. and Mrs. Shurtleff filed a joint Chapter 7 bankruptcy also in the District of Utah (Bankruptcy No. 82-C-02670).

A controversy arose concerning loca-

tion of title to certain property. The debtor Frontier Properties, Inc (a general partner in several limited partnerships) claimed ownership as did the limited partnership (LP 123). As a result the trustee initiated an adversary proceeding (No. C82-1246-K11) on June 25, 1982, against LP 123 seeking declaratory relief from this court. Attorney John Ross answered for the limited partnership and brought a cross-complaint on December 13, 1982, on behalf of LP 123, each of the individual limited partners and himself. Three motions were made by various parties to dismiss the cross-complaint. In addition, the trustee filed a motion to strike the answer. Each motions to dismiss aditionally sought sanctions.

On December 2, 1982, attorney Ross filed a complaint (C82-3048-K) against the same parties sued in the aforementioned cross-complaint, and additionally named the Kinzels, David Lien, Laura Littleton and

Cornell-Stewart and Associates as defendants. In so doing he claimed to represent five limited partnerships, all the limited partners thereof, and himself.

Motions to dismiss the complaint were filed. Mr. Lien answered the complaint

For the reasons stated hereafter the court concludes that the Answer filed in Complaint C82-1246 should be allowed to stand and the Cross-Complaint in that action should be dismissed. The Complaint of Adversary Proceeding No. C82-3048 should be dismissed and the Answer of David Lien stricken.

II

ANSWER TO COMPLAINT FOR DECLARATORY RELIEF

The complaint for declaratory relief was filed by the trustee against the limited partnership LP 123. Attorney Ross answered on behalf of LP 123. The court concludes that in so doing Mr. Ross acted

without authority.

It is clear that California Corporations Code Section 15509 provides, with some exceptions not relevant here, that a general partner of a limited partnership has all the rights and powers of a partner in a general partnership. Section 15018(e) of the Corporations Code gives a general partner the right of management and conduct of the partnership business. The rights and duties of limited partners are to be determined by [section] 15536 of the Corporations Code "subject to any provisions in the partnership agreement." (West's Annotated California Corporations Code, Volume 24A, Supp., p. 127). In this case the limited partnership agreements explicitly provide that the general partners shall have sole authority to employ attorneys.

Mr. Ross admits that he was not retained by the general partner. He is

therefore prohibited from representing limited partnerships.

This decision produces the unpalatable result of forcing the trustee to bring suit against himself for declaratory relief. This court holds that Mr Ross may, therefore, based on the decision in Ames v. Frontier Properties, Inc., C82-0588-K, represent the limited partners in this and related actions because their interest is not sufficiently protected by the general partner. Thus, the answer filed on December 13, 1982, by Mr. Ross will be deemed to have been filed by the limited partners to protect their interests.

As a condition to this resolution, however, the court requires Mr. Ross to notify each limited partner of his right to select other counsel. Proof of service of the aforementioned notice must be filed within the court within 15 days of the date of this memorandum.

The motion to strike answer is denied.

III

MOTIONS TO DISMISS THE CROSS-COMPLAINT (C82-1246-K) BY ELLIOTT, ESTES & KOCHERANS, KENMAN CORPORATION & HOLMANS
MOTIONS TO DISMISS THE COMPLAINT (C82-3048-K) BY ELLIOTT, ESTES & KOCHERHANS & KENMAN CORPORATION

The cross-complaint makes seven claims for relief. The complaint duplicates these claims and adds another for recovery of wrongfully applied funds. The identical nature of these pleadings permits the court to deal with them concurrently.

1. Reclamations of Property

As noted previously Mr. Ross represents only the limited partners and not the partnership itself. The case of Evans v. Galardi, 16 Cal. 3d 300, 307 (1976), expresses the accepted view that a limited partner has no rights in any specific asset owned by the partnership.

Reclamation of Property is an inappropriate remedy for the limited partners to

seek. The limited partners cannot state a claim for which relief may be granted.

Also of note is the fact that this issue has been litigated previously. Mr. Ross filed a very similar pleading in both Vigeon v. Shurtleff, C82-0094-K11 and Erickson v. Frontier Properties, Inc., C82-0964-K. In those cases involving the same facts, parties and transactions, this court dismissed with prejudice this claim against Mr. Elliott (individually and as trustee) and Mr. Estes. These parties should not be required to defend themselves four or more times against the identical claim.

2. Fraud and Deceit

The limited partners seek damages from the general partner for fraud and deceit. Insofar as moneys or properties are sought from the debtor, this represents a claim against the debtor's estate. A proof of claim should be (and still may be) filed in the underlying bankruptcy case.

"[T]he filing of a proof of claim is an indispensible prerequisite to ultimately sharing in a liquidation case in the distribution of the assets of the debtor to the holders of allowed claims." 3 Collier on Bankruptcy 15th ed. 501-13, 501-14.

Should a claim be filed and the trustee object thereto, the matter can be determined in the appropriate manner.

The court again notes that this identical cause of action was dismissed as against Elliott (as an individual and as trustee) and Estes.

The second claim for relief should also be dismissed because there is an improper joinder of parties plaintiff concerning a claim for fraud. Both the Federal Rules of Civil Procedure and the Bankruptcy Rules require particularity in the pleadings sufficient to adequately put defendant on notice. There are no particular allegations as to how each of these

individual plaintiffs or partnerships was defrauded. The claim, therefore, must also fail for lack of specificty and particularity.

3. Interference with Contractual Relations and/or Breach of Fiduciary Duty

The proper and required elements of the interference claim are presented by the case of Institute of Veterinary Pathology, Inc v. California Health Laboratories, 116 Cal. App. 3d 111, 126 (1981). They are (a) existence of a prosspective business relations advantageous to plaintiff; (b) the defendant has knowledge of the relationship; (c) intentional conduct by defendant to disrupt the relationship; (d) actual causation; and (e) damages to plaintiff proximately caused by defendant's conduct.

No prospective relationship has been defined in the pleadings. Mr. Ross complains that the limited partners have

"... lost and will loss [sic] valuable contractural [sic] rights ... and will thereby incur damages and losses in sums not presently known." It appears that no damages have yet been incurred and any action on this claim would be premature. Thus, no claim has been stated, and none can be, upon which relief can be based.

As to breach of fiduciary duty, this court is satisfied by the pleadings, evidence, argument of counsel and previous disposal of the identical issue in Vigeon, supra and Erickson, supra, that Mr. Ross has failed to state a claim against the trustee.

Mr. Elliot's fiduciary responsibilities are defined by the Bankruptcy Code. Mr. Ross may at any time, on behalf of an interested party whom he represents, present a petition to have the trustee removed under [section] 324 of the Code.

. . . .

4. Accounting

The trustee may be required by Bankruptcy Code 1106(A)(1) to provide requested information to parties in interest. The limited partners represented by Mr. Ross are parties in interest. This claim is nevertheless denied, however, because complainant states no facts showing that he attempted to obtain this information in the prescribed manner. A complaint is not in order at this point. This is confirmed by the holdings in Vigeon, supra and Erickson, supra.

Additionally, the costs of providing each of the limited partners with an accounting, which duplicates the information filed in the operating reports, would place an insufferable demand upon the time and resources of the trustee and the estate.

5. Abuse of Process

Two elements are required to show

abuse of process: (a) an ulteriour motive; and (b) willful misuse of process. Ivey v. Board of Regents, 673 F2d 266 (9th Cir. 1982). The cited case stands for the proposition that vague allegations concerning violations are inadequate to support such a claim and require dismissal. Mr. Ross alleges an ulterior motive, but ofers no evidence nor assertions as to any specific abuses of process.

Complainants fail to state a claim.

6. Ancillary Defendants

The limited partners claim that the "ancillary defendants" participated with the trustee to dispose of certain property belonging to complainants without complainants' consent or authorization.

First, it should be remembered that the trustee acted under authority of court order [see Order Approving Sale (Colonial House Sale) on May 20, 1982, in the underlying Bankruptcy Case No. 81-02593-K11

[emphasis added]; Order Approving Sale of Real Property (Shurtleff Financial Center) on August 13, 1982]. Obviously, as to those orders this action is improperly filed. The issues are res adjudicata as to this case.

Again, however, we point out that the limited partners have no recognizable interest in specific assets of the limited partnersip. Evans v. Galardi, supra. The limited partners cannot assert a claim for relief against third parties for specific assets of the estate. No facts are stated upon which relief can be granted against any of these defendants, becasue they are required by law to deal, not with any limited partner, but with the general partner, which they did.

5. Jurisdiction and Venue

Inasmuch as Mr. Ross admits in both pleadings that he has twice initiated other actions (C82-0094/95; C82-0964)

involving the same claims, the same transactions, the same parties, we find the subject actions to be duplicative, unnecessary and filed in bad faith. Such action is recognized and justified by Roadway Express, Inc. v. Pipers, 447 U.S. 752, 766 (1980); and Lipsig v. National Student Marketing, 663 F.2d 178 (D.C. Cir. 1980), which held that when litigation is filed in bad faith, or simply to burden the opposition by forcing them to spend extra time and money on a case attorney fees are recoverable.

8. Wrongfully Applied Funds

Complainants assert that Laura Littleton and Cornell-Stewart And Associates were notified by a "representative" of the limited partnership that they were not authorized to manage the Summerfield property.

These defendants have properly dealth with the general partner according to the

allegations. It must be remembered that Mr. Ross does not represent the partnership, only the limited partners. They have no right to conduct the affairs of the partnership.

If and when the partnership is dissolved or reorganized with court approval and sanction these issues may be resolved in another manner. For the present, however, and the foreseeable future, no claim for relief has been stated against these defendants.

IV

CONCLUSION

The complainant has failed to state sufficient facts to state a legitimate claim against any defendant herein. For that reason the complaint (C82-3048) and the cross-complaint (C82-1246) are dismissed. As a result, the answer of David Lien is necessarily stricken. The duplicative, unnecessary nature of this liti-

gation impels this court to hold as a matter of law that complainants are guilty of bad faith. Reasonable attorney fees as determined by the court will be allowed as a sanction pursuant to the authority of Roadway Express, Inc. v. Pipes, supra; and Lipsig v. National Student Marketing, supra, to Elliott, Estes, Kocherhan, Kenman Corporation, and Holman, and Lien.

The above constitutes the Findings of Fact and Conclusions of Law herein. FRCP 52; Bankruptcy rule 752.

DATED; March 14, 1983

/s/ Herbert Katz, Judge
United States Bankruptcy Court

In re Shurtleff, Case No. 81-02594-K11
Adversary Nos. C82-3048 and C82-1246

NOTE: This note is made to clarify the following pleadings which are presented to demonstrate the position of the bankruptcy court that it may order the sale of property by a **motion** in the **underlying** bankruptcy case when it is the subject of an **impending** adversary action by a trustee to avoid a transfer of the property to third parties. The avoidance action is a separate suit under Bankruptcy Rule 701 (now 7001). Objections to this practice are that the trustee cannot prevail if he fails to comply with the statute of limitations of 11 USC 546; and this practice results in the court thereafter presuming in a subsequent **summary** action that avoidance shall occur. A second issue is acknowledging that **bare legal title** is not the controlling factor in application of 11 USC 544(a)(3). The majority view on these issues is presented by In re Gurs (BAP 9, 1983) 27 B.R. 163.

JOEL C. ESTES
ESTES & HOYT
A Professional Corporation
1010 Second Street, Ninth Floor
San Diego, CA 92101-5051

Attorney For Thomas D. Elliott, Trustee

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re LEWIS W. SHURTLEFF, INC Debtor.	Chapter 11 Case No. 81-02593-K
In re FRONTIER PROPERTIES, INC Debtor.	ORDER APPROVING SALE OF REAL PROPERTY (SHURTLEFF FINANCIAL CENTER)

The hearing on the proposed sale of the real property known as the Shurtleff Financial Center, located at 535 Broadway, El Cajon, California, and more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof, to David A. Lien, duly came on for hearing on July 23, 1982, the Honorable Herbert

Katz, United States Bankruptcy Judge, presiding. Thomas D. Elliott, trustee, appeared in person and by counsel, Joel C. Estes; limited partners of Frontier Properties LP 111 Shurtleff Financial Center, a limited partnership (hereinafter referred to as "LP 111") appeared by their attorney, John M. Ross; and the Creditors' Committee appeared by its counsel, Donald Merkin.

The court having heard and considered the evidence and the objections to the proposed sale filed herein by John M. Ross, and having made it findings of fact and conclusions of law, and good cause appearing;

IT IS ORDERED that the sale of said real property free and clear of any interest to David A. Lien for $634,250 cash is hereby approved on the condition that said price of $634,250 is greater than the aggregate value of the recorded liens on said proeprty.

IT IS FURTHER ORDERED that the interest,

if any, of LP 111 and of any holders of valid liens not paid out of escrow, shall attach to the proceeds of sale of said real property, which proceeds shall be held by the Trustee in a separate account until further order of the Court.

Dated: August 13, 1982

/s/ Herbert Katz, Bankruptcy Judge

. . . .

JOEL C. ESTES
ESTES & HOYT
A Professional Corporation
1010 Second Street, Ninth Floor
San Diego, CA 92101-5051

Attorney For Thomas D. Elliott, Trustee

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re LEWIS W. SHURTLEFF, INC Debtor.	Chapter 11 Case No. 81-02593-K
In re FRONTIER PROPERTIES, INC Debtor.	ORDER APPROVING SALE OF REAL PROPERTY (SHURTLEFF FINANCIAL CENTER)

The hearing on the proposed sale of the real property known as the Shurtleff Financial Center, located at 535 Broadway, El Cajon, California, and more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof, to David A. Lien, duly came on for hearing on July 23, 1982, the Honorable Herbert Katz, United States Bankruptcy Judge, presiding. Thomas D. Elliott, trustee, appeared in person and by counsel, Joel C. Estes; limited partners of Frontier Properties LP 111 Shurtleff Financial Center, a limited partnership (hereinafter referred to as "LP 111") appeared by their attorney, John M. Ross; and the Creditors' Committee appeared by its counsel, Donald Merkin.

The court having heard and considered the evidence and the objections to the proposed sale filed herein by John M. Ross, makes the following findings of fact and

conclusions of law;

FINDINGS OF FACT

1. The title of said real property known as the Shurtleff Financial Center is and at all time since the commencement of this case has been in the estate of debtor Frontier Properties, Inc.

2. As of the commencment of this case, the grant deed by which debtor Frontier Properties, Inc. purportedly granted LP 111 an interest in said real property was unrecorded.

3. The sale of said real property free and clear of any interest therein to David A. Lien for $634,250 is in the best interest of the estate of debtor Frontier Properties, Inc.

4. The interest is said real property, if any, of LP 111 will be adequately protected by the attachment of such interest to the proceeds of sale.

5. There is no evidence that the sale

price of $634,250 is not greater that the aggregate value of all liens against said real property.

CONCLUSIONS OF LAW

1. The Trustee has the right to sell said real property pursuant to Bankruptcy Code Section 544(a)(3).

2. The Court should approve the proposed sale of said real property to David A. Lien on the terms set forth in Finding of Fact No. 3 herein, on condition that the sales price of $634,250 is greater than the aggregate value of the recorded liens on said property.

3. The interest, if any, of LP 111 and of any holders of valid liens not paid out of escrow, shall attach to the proceeds of sale of said property, which proceeds shall be held by the trustee in a separate account until further order of the Court.

Dated: August 13, 1982

/s/ Herbert Katz, Bankruptcy Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STANDING COMMITTEE ON DISCIPLINE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA,	Filed June 25, 1984, Phillip B. Winberry Clerk US Court Of Appeals
Plaintiff-Appellee,	No. 83-6160
vs.	USDC No. CV83-0855-WBE
JOHN M. ROSS,	OPINION
Defendant-Appellant.	

Submitted: April 4, 1984

Appeal from the United States
District Court for the
Southern District of California

Before: Wallace, Schroder and Nelson,
Circuit Judges.

NELSON, Circuit Judge:

John M. Ross appeals the district court's order suspending him from the practice of law in the Southern District of California for one year and placing him on probation for an additional four years. The court sanctioned Ross after he violated a number of rules of professional

conduct. The issues on appeal are whether the proceeding below was fair, the evidence was sufficient, and the penalty was reasonable. We affirm.

Background

Between 1980 and 1983, in the course of his practice before the District Court and Bankrupcy Court of the Southern District of California, Ross consistently violated the American Bar Association Code of Professional Responsibility (ABA Code) and the California Rules of Professional Conduct (California Rules). On April 29, 1983, the local Standing Committee on Discipline (the Committee) petitioned the court for an order to show cause why Ross should not be disbarred or suspended. The court held a lengthy hearing on the motion on August 2, and entered its findings ten days later. It ordered Ross suspended from practice for five years, but stayed the last four years of punishment in favor of

probation. On August 22, Ross moved for rconsideration of the order and to reopen the proceedings to introduce new evidence. After a second hearing the court denied this motion. Ross appeals from the disciplinary order and the denial of his motion for reconsideration.

Discussion:

I. The Disciplinary Proceeding Was Fair

Any court which has the power to admit attorneys to practice may also sanction them for unprofessional conduct. See e.g., Koden v. United States Dept. of Justice, 564 F.2d 228, 233 (7th Cir. 1977). The nature of disciplinary proceedings is neither civil nor criminal, but an investigation into the conduct of the lawyer-respondent. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433, n. 12 (1982). At a minimum, however, an attorney subject to discipline is entitled to procedural due process,

including notice and an opportunity to be heard. See In re Buffalo, 390 U.S. 544, 550 (1968). In such case, the question before the court is whether an attorney may continue to practice a profession imbued with the public interest and trust. See In re Echles, 430 F.2d 347, 350 (7th Cir. 1970). The court must consider both the fitness of one of its officers and the need to protect the public from an unqualified or unscrupulous practitioner. See Ex Parte Wall, 107 U.S. 265 (1882).

In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment. See 28 U.S.C. 1654. In The Southern District of California, Local Rule 110-5 states that attorneys must abide by the California Rules, the ABA Code, and applicable court decisions. Rule 115 allows the

court to refer matters of attorney misconduct to its disciplinary body. Rule 110-6 vests the Committee with the power to investigate such cases and establishes the manner of prosecution.

We find no error in the procedure employed here. Ross received proper notice of the disciplinary proceedings and the court granted him more than three months to prepare his defense. It conducted two lengthy hearings at which he was allowed to present evidence and testify. In short, the treatment accorded Ross provided him with a pointed example of the fairness of the court whose integrity his conduct had endangered.

II. The Evidence Below Supports The Findings Below.

For the purpose of review, we have divided the acts upon which the district court based its disciplinary order into six categories. We will not overturn the

findings of fact in support of such an order unless clearly erroneous. See Levenson v. Mills, 294 F2d 397, 398 (1st Cir. 1961), cert. denied, 368 U.S. 954 (1962).

A. Criminal convictions

Ross was convicted once in California state court for battery against another attorney and twice in federal court for criminal contempt. In the disciplinary proceeding, the district court ruled that Ross' actions violated Disciplinary Rule (DR) 1-102(A)(5) and 1-102(A)(6) of the ABA Code, which prohibits a lawyer from engaging in conduct prejudicial to the administration of justice or adversely reflecting on his fitness to practice. Ross first contends that his convictions were politically motivated, but we need not consider that argument. Ross chose not to appeal his convictions directly and they are not subject to retrial or collateral attack in the discipinary forum. See

Laughlin v. United States, 474 F2d 444, 447 (D.C. Cir. 1972), cert. denied, 412 U.S. 941 (1973); Lark v. West, 289 F2d 898 (D.C. Cir. 1961).

Ross also claims that mere criminal activity, without the showing of moral turpitude, will not sustain the order below. On the contrary, we believe that lawyers have a special obligation to obey the law; lawyers who act illegally diminish the stature of the legal profession and reduce public confidence in the rule of law. See ABA Code, Ethical Consideration 1-5. For this reason, even a single conviction for contempt of court may, in special circumstances, subject a lawyer to discipline. See Greene v. Virginia State Bar Association, 411 F. Supp. 512, 517-18 (E.D. Va 1976). Under this standard, there can be no question that Ross' record which includes the commission of battery against a fellow attorney, merits strong sanction.

B. Vexations litigation.

The district court and bankruptcy court each fined Ross for prosecuting malicious, duplicative lawsuits. The district court actions involved civil and criminal complaints against various individuals, the San Diego District Attorney, four state court judges, and the Chief Justice of the California Supreme Court. The bankruptcy court action was the third, according to Ross' own pleadings, that he had filed involving the same transaction and parties.

We affirm the findings below that Ross' suits violated California Rule 2-110 and DR 1-102(A)(5) and 7-102(A)(1) of the ABA Code. The cannons of professional ethics impose on every lawyer an obligation "not to clog the courts with frivilous motions or appeals." Polk County v. Dodson, 454 U.S. 312, 323 (1981). Indeed, the filing of a single frivilous claim

after a warning may be sufficient to trigger disciplinary proceedings. Panagopoulous v. INS 434 F2d 602 (1st Cir. 1970). Moreover, lawyers who make frivilous and unsupported allegations of criminal conduct against judges deserve harsh punishment. In re Sareles, 360 F. Supp. 794, 800 (N.D. Ill. 1973), aff'd 497 F2d 926 (7th Cir. 1974). Such accusations undermine public respect for courts and demonstrate "a gross failure of professional judgment and character." Id. at 801.

C. Threats of physical harm

Ross twice menaced opposing attorneys with physical threats. When one opposing counsel told Ross that a complaint against his client was unintelligible, Ross responded, "if you get in my way, I'm going to punch you right in the f---ing face." In another instance, Ross sent a letter to two attorneys which stated in part: "Your comments imply that I may be engaging in

dilatory conduct and I specifically deny that I would even consider doing so. The last attorney at San Diego who made this scurrilous suggestion was the late Richard Crake."

The district court found that this conduct again violated DR 1-102(A)(5) & (6) of the ABA Code. We believe Ross' acts speak for themselves. Combined with his battery conviction, they reveal an ignominious pattern of conduct flouting standards of human decency much more basic than those of any professional code.

D. Threat of criminal charges

In connection with a bankruptcy case, Ross sent a letter to a company hired by an opposing party to manage an apartment complex. The letter insisted that the company resign and concluded by stating: "Failure to comply with this demand will result in a request for criminal charges against you for embezzlement or such other

offenses as may be appropriate." The district court found that, by threatening to present criminal charges to obtain an advantage in a civil action, Ross violated California Rule 7-104 and DR 7-105 and DR 1-102(A)(5) of the ABA Code.

Ross argues that his letter was appropriate because the opposing party had no right to control the disputed property. The respective rights of the parties, however, were a matter for the bankruptcy court to decide. Criminal proceedings, by contrast, are designed to protect society as a whole. See ABA Code Ethical Consideration 7-21. Ross' threat to bring criminal charges was clearly intended to coerce his opponent to settle the civil claim. Because such action frustrates civil adjudication, we agree that it constituted an abuse of judicial process. See Librarian v. State Bar 38 Cal.2d 328, 239 P.2d 865 (Cal. 1952).

E. Unauthorized representation

Ross filed a class action complaint on behalf of several individuals, although he was authorized to represent only the limited partnership in which they owned shares. When one plaintiff asked Ross to delete his name from the complaints, Ross verbally abused him and sent him a letter that concluded with a pointed reference to the Apocalypse. The district court decided that these actions prejudiced the administration of justice, reflected adversely on Ross' fitness to practice, and involved fraud, deceit, and a willfull failure to exercise judgment, in violation of California Rule 6-101(2) and DR 1-102(A)(4), (5), & (6) of the ABA Code.

Ross contends that bankruptcy law permitted him to maintain derivative and class actions on behalf of the individual limited partners. First, Ross' characterization of applicable law is undercut by

the fact that the bankruptcy court fined him for filing duplicative lawsuits. Second, DR 1-104(A)(5) of the ABA Code prohibits a lawyer who represents a party from seeking employment from other potential parties even where his own client's success is dependent on their joinder. Third, even if Ross' filings had been proper, his implied threat against one of his unwilling plaintiffs was totally unjustified. Given the number of ethical violations arising out of this incident, we believe that the district court properly relied on general proscriptions to sanction Ross.

F. False advertising

After receiving a letter informing him that no openings on the local bankruptcy trustee panel existed, Ross placed a newspaper advertisement stating that he was "Approved as a Bankruptcy Trustee by US Courts." The district court found that

Ross thereby violated California Rule 2-101(A), and DR 1-102(A)(4) and DR 2-101(A) of the ABA Code, which prohibit false advertising and dishonesty or misrepresentation. Ross contends that his advertisement was not false because it contained the word "approved" instead of "appointed."

As a general rule, lawyers may freely advertise the availability and terms of routine legal services, but the bar retains the power to restrain purveyors of false or misleading information. See Bates v. State Bar of Arizona 433 U.S. 350, 375, 384 (1977). The district court could reasonably have found that the use of the word "approved" misled laymen unfamiliar with the panel appointment process. Moreover, 28 U.S.C. 604(f) forbids an actual trustee from using his official title, through advertising or otherwise, to promote his legal practice. Even if Ross had been appointed to the panel,

therefore, his advertisement violated the statute.

III. The Penalty Imposed Was Reasonable

Under the terms of the district court order, Ross will actually serve only one year of his five year term of suspension, and spend the balance on probation. Moreover, the court delayed the date on which his suspension would begin to allow him to finish his current work before the Bankruptcy court. Ross still claims that his punishment is excessive. We review the terms of a disciplinary order for an abuse of discretion. See United States v. Dinitz 538 F2d 1214, 1219 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1974).

If the sanction below was excessive, it was excessive only in its lenience. Ross' appeal is disturbing not because of any error by the trial court, but because of his wholly unrepentent attitude in the face of multiple criminal convictions and

the excessive documentation of his unprofessional conduct. The Committee properly characterizes his brief as "little more than a series of wild, irrelevant and unsubstantiated accusations against the court, attorneys, and the public at large. In each particular, his record places "in doubt his ability to exercise the judgment which advocacy requires." In re Whiteside, 386 F2d 805, 806 (2d. Cir. 1967). It was altogether proper for the district court to punish Ross as it did.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STANDING COMMITTEE ON DISCIPLINE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA Plaintiff-Appellee, vs. JOHN M. ROSS, Defendant-Appellant.	)	NO. 83-6160 USDC No. CV 83-0855-WBE

Appeal From The United States District Court for the Southern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered June 25, 1984.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE STANDING COMMITTEE ON DISCIPLINE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA,	)	CASE NO. 83-0855-E(I)
Petitioner,	)	FINDINGS OF FACT AND ORDER
vs.	)	
JOHN M. ROSS,	)	Filed on Aug 11 1983
Respondent.	)	Entered on Aug 12 1983

The Court, having considered the pleadings, evidence, oral testimony, and arguments of the parties, including lengthy testimony by respondent explaining the facts and circumstances surrounding the conduct described below, enters the following findings of fact and order pursuant to Local Rule 110-6(c):

1. On April 29, 1983, the Standing Committee on Discipline of the United States District Court for the Southern District of California (hereinafter "petitioner") filed a Petition for issuance of

an Order to Show Cause why John M. Ross (hereinafter "respondent") should not be disbarred, suspended or otherwise disciplined as prayed for in the Petition. The Order to Show Cause was served upon respondent in a timely fashion.

2. The hearing on the Order to Show Cause was originally set for May 18, 1983, and was thereafter continued several times to afford respondent ample opportunity to prepare his defense. He was given until July 29, 1983 to conduct any discovery.

3. Respondent filed a demand that the file and all hearings in this matter be made open to the public. At the specific request of respondent, on July 26, 1983, the proceedings were thereafter made open to the public.

4. Respondent filed a motion to "Dismiss and Strike Complaint", which was heard on July 26, 1983. The motion was denied in its entirety.

5. On August 2, 1983, at 9:00 a.m. in Courtroom No. 3, the final hearing on the Order to Show Cause was held before the Honorable William B. Enright. Petitioner appeared by E. Miles Harvey, Howard B. Frank and Joseph W. Ruff, all memebers of the Standing Committee on Discipline. Respondent appeared in pro per.

6. The parties stipulated that the Petition with accompanying exhibits, along with respondent's Answer to the Petition, could be received into evidence by this Court.

7. On or about November 19, 1982, in the case of United States of America vs John M. Ross, United States District Court, Southern District of California, Case No. 82-0627-G-Criminal, respondent was convicted of two counts of Contempt of Court in violation of 18 U.S.C. 401. On count one respondent was sentenced to ninety days imprisonment with execution of

sentence suspended and respondent placed on probation for a period of three years. On count two respondent was sentenced to imprisonment for a period of ten days. No Notice of Appeal was filed, and the conviction has become final. This conduct by respondent violated Disciplinary Rules (hereinafter "D.R.") 1-102(A)(5) and 1-102 (A)(6) of the American Bar Association Code of Professional Responsibility (hereinafter "ABA Code").

8. On or about July 17, 1980, in the case of People vs John Michael Ross, Municipal Court of California, County of San Diego, San Diego Judicial District, Criminal Case No. M334049, respondent was convicted of violating California Penal Code 242, in that respondent committed battery on an attorney in the United States Courthouse. Respondent was placed on summary probation, with imposition of sentence suspended for one year on

condition that he pay a $100.00 fine and commit no acts of violence. This conduct by respondent violated D.R. 1-102(A)(5) and 1-102(A)(6) of the ABA Code.

9. On or about March 14, 1983, in the case of In Re Shurtleff, United States Bankruptcy Court, Southern District of California, Case No. 81-02593-K11, Adversary No. C82-3048-K11, respondent was found by the Court to have engaged in "duplicative, unnecessary and vexatious litigation in bad faith," and was ordered to pay $500.00 to each of the defendants as a sanction. This conduct by respondent violated Rule 2-110 of the California Rules of Professional Conduct (hereinafter "California RPC"), and D.R. 1-102(A)(5) and 7-102(A)(1) of the ABA Code.

10. On or about February 19, 1980, in the case of Ross vs The Honorable Rose Bird, United States District Court, Southern District of California, Civil No.

79-1725-T, respondent was found by this Court to have engaged in "a pattern of wanton, oppressive and vexatious litigation." Respondent was ordered to pay $4,675.00 as sanctions for his conduct. Respondent was subsequently, on or about November 19, 1980, enjoined by this Court from filing further frivilous and vexatious law suits without leave of court in the case of Ross vs. Fowler, Civil No. 80-1564-T. This conduct by respondent violated Rule 2-110 of the California RPC, and D.R. 1-102(A)(5) and 7-102(A)(1) of the ABA Code.

11. On or about January 28, 1983, respondent had a telephone conversation with attorney Wallace L. Rosvall relating to a bankruptcy case, in which respondent used obusive and threatening language and threatened to punch Mr. Rosvall in the face. This conduct by respondent violated D.R. 1-102(A)(5) and 1-102(A)(6) of the

ABA Code.

12. On or about March 28, 1983, respondent sent a letter to attorney Joel C. Estes and Donald Merkin relating to a bankruptcy matter. In the letter respondent stated, "Your comments imply that I may be engaging in dilatory conduct and I specifically deny that I would even consider doing so. The last attorney at San Diego who made this scurrilous suggestion was the late Richard Crake." This conduct by respondent violated D.R. 1-102(A)(5) and 1-102(A)(6) of the ABA Code.

13. On or about July 30, 1980, respondent was sent a letter from the Administrative Offrice of the United States Courts advising him that he was not being appointed to the Bankruptcy Trustee Panel for the Southern District of California. In early August of 1980 respondent placed one or more newspaper advertisements stating that he was "Approved as a Bankruptcy

Trustee by U.S. Courts." In a letter dated September 2, 1980, respondent was advised that this advertisement was false, and that even if respondent had been appointed as a Trustee, the advertisement would be in violation of 27 U.S.C. 604(f). This conduct by respondent violated Rules 2-101(A) of the California RPC, and D.R. 1-102(A)(4) and 2-101(A) of the ABA Code.

14. On or about December 6, 1982, respondent acted in a threatening manner both verbally and in writing, toward Clarence W. Ginos. This conduct by respondent violated D.R. 1-102(A)(5) and 1-102 (A)(6) of the ABA Code.

15. During 1982, in the case of In re Shurtleff, United States Bankruptcy Court, Southern District of California, Bankruptcy No. 81-02593-K, Adversary No. C82-0526-K11, respondent filed a Complaint purportedly on behalf of a number of individual plaintiffs. Marion G. Bench, James D.

Bench, Canice Ciruzzi, Vincent R. Ciruzzi, and Clarence W. Ginos were included by respondent as plaintiffs who he was representing, but in fact he had never obtained their authorization to represent them as individuals or to file the Complaint on their behalf. This conduct by respondent violated Rule 6-101(2) of the California RPC, and D.R. 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6) of the ABA Code.

16. On or about February 16, 1982, Louis W. Mathews and Sharon J. Mathews sent a letter to respondent, informing him that he did not represent them and had no authority to file a Complaint on their behalf. Thereafter, on or about June 18, 1982, respondent lodged a Proposed Complaint in Intervention in the case of In re Shurtleff, United States Bankruptcy Court, Southern District of California, Bankruptcy No. 81-2593-K11, Adversary No C81-1147-K11, naming the Mathews as inter-

veing plaintiffs. On or about December 2, 1982, respondent filed a Complaint in the Shurtleff case Adversary No. C82-3048-K11, naming the Mathews as plaintiffs. On or about January 25, 1983, respondent filed a Complaint in the case of Frontier Properties vs Shurtleff, United States District Court, Southern District of California, Case No. 83-0197-GT(H), naming Mathews, James D. Bench, Marion G. Bench, Clarence W. Ginos, Vincent R. Ciruzzi and Canice G. Circuzzi (sic) as individual plaintiffs. This conduct by respondent violated Rule 6-101(2) of the California RPC, and D.R. 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6) of the ABA Code.

17. On or about August 22, 1982, respondent sent a letter to Cornell-Stewart & Associates, Inc., relating to the Shurtleff bankruptcy proceeding, wherein respondent stated, "Failure to comply with this demand will result in a request for

criminal charges against you for embezzlement or such other offenses as may be appropriate." This conduct by respondent violated Rule 7-104 of the California RPC, and D.R. 7-105 and 1-102(A)(5) of the ABA Code.

18. The Court finds that respondent was guilty of unprofessional conduct which degrades or impugns the integrity of the Court and interferes with the administration of justice therein, in violation of Local Rules 110-5 and 110-6. The specification of ethical rules above which were violated by respondent does not mean respondent's respondent's conduct did not also constitute violations of other ethical rules and duties.

19. On or about February 23, 1983, respondent sent a leter to the Clerk of the Bankruptcy Appellate Panels of the Ninth Circuit, regarding Frontier Properties vs Lien, BAP No. SC-82-1377. In

this letter respondent stated, "We remain disillusioned by the apparent efforts to cover for the appellees regardless of merit." This Court does not find this letter to constitute unprofessional conduct.

20. On or about December 6, 1982, respondent sent a letter to Clarence W. Ginos which stated in part "Even if Judge Katz is just skirting corruption, his conduct jeopardizes the integrity of the entire Federal bench. You may note that wherever there is cirticism of the Bankruptcy Court at San Diego, Judge Katz is the only judge right in the middle of the thicket." This Court does not find this letter to constitute unprofesional conduct.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that respondent John M. Ross be suspended from practicing law in the

Southern District of California for a period of five years. The suspension is stayed with respondent placed on probation for that period with actual suspension of one year to begin January 1, 1984. The delay in beginning the actual suspension is to allow respondent an opportunity to wind up his current representation in the bankruptcy court. The probation period shall commence on the date this Order is signed. The probation is granted on condition that respondent adhere to the standards of professional conduct required uner Local Rule 110-5.

IT IS FURTHER ORDERED, that with the exception of the Findings of Fact and Order, the file on this matter shall be sealed.

IT IS SO ORDERED.

DATED: August 11, 1983

/s/ WILLIAM B. ENRIGHT
Judge, United States District Court

PROOF OF SERVICE

JOHN M. ROSS declares as follows: I am an attorney licensed to practice law before this court and I served the following document(s) by depositing a copy of each document in a separate sealed envelop addressed to each person named below and by depositing said envelop(s) with the U.S. Postal Service at San Diego County, CA on the date(s) indicated below with first class postage therefor prepaid.

DOCUMENT(S) SERVED:

Notice of Appeal And Jurisdictional Statement.

PERSON(S) SERVED:

Clerk, U.S. Court of Appeals For The Ninth Circuit, Box 547, San Francisco, CA 94101

Clerk, U.S. District Court, 940 Front St., San Diego, CA 92189

Clerk, U.S. Bankruptcy Court, 940 Front St., 5-N-17, San Diego, CA 92189

. . . .

Sally Ledden, 101 W. Broadway, Ste. 1200, San Diego, CA 92101

Joel C. Estes, 1010 Second St.,9th Floor, San Diego, CA 92101

Kevin J. Hoyt, 1010 Second St. 9th Floor, San Diego, CA 92101

Donald Merkin, 4420 Hotel Circle Ct. #130 San Diego, CA 92108

N. James Richardson, 110 W. C. Street, Ste. 1015, San Diego, CA 92101

Keith McWilliams, 2255 Camino del Rio S., San Diego, CA 92108

Richard Bain, 2250 Fifth Street, Ste. 524, San Diego, CA 92103

Richard Salisch, 124 W. Shaw Street, #107 Fresno, CA 93704

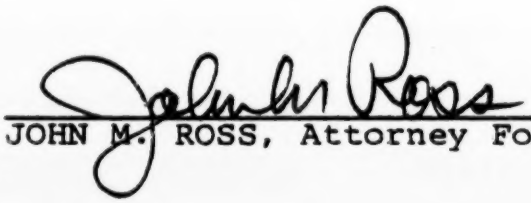
Wallace L. Rosvall, 533 Freemont Street, Los Angeles, CA 90071

Peter K. Nunez, 940 Front Street, San Diego, CA 92189

Solicitor General, Department of Justice, Washington, D.C. 20530

The originals of said pleadings were mailed to the addressees on September 11, 1984. Revised copies of said pleadings submitted pursuant to Rule 33.7 of the Rules of the United States Supreme Court were mailed to said addressees on October 17, 1984.

Executed at San Diego County, California on October 17, 1984



JOHN M. ROSS, Attorney For Appellants

84-658

Office-Supreme Court, U.S.
FILED
SEP 12 1984
ALEXANDER L. STEVAS,
CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:	Bankruptcy
	No. 81-2593
LEWIS W. SHURTLEFF, INC., and FRONTIER PROPERTIES, INC.	So. Calif.
	CA# 83-6104
Debtors.	So. Calif.
THOMAS D. ELLIOTT, etc., et al.,	DC# C82-1246
	So. Calif.
Appellees,	
vs.	CA# 83-6105
	So. Calif.
FRONTIER PROPERTIES LP 123, etc., et al.,	DC# C82-3048
Appellants.	So. Calif.
FRONTIER PROPERTIES LP 101, etc., et al.,	CA# 83-6148
	So. Calif.
Appellants,	
vs.	DC# SC82-1377
	So. Calif.
LEWIS WARREN SHURTLEFF, et al.,	
	CA# 83-6160
Appellees,	So. Calif.
STANDING COMMITTEE ON DISCIPLINE, etc.,	DC# CV 83-855
	So. Calif.
Appellees,	
vs.	
JOHN M. ROSS,	
Appellant.	

On Appeal From The United States
Court Of Appeal For The Ninth Circuit
To The United States Supreme Court

NOTICE OF APPEAL

John M. Ross (Admitted 4/1/74)
P.O. Box 19547, San Diego CA 92119
Phone (619) 697-3504
Attorney For Appellants

10PP

I

PARTIES TO THIS APPEAL

APPELLANTS: Frontier Properties LP/123/ Colonial Arms 1981, a partnership, Frontier Properties /LP/101/ Summerfield/Arms/ 79, a partnership, Frontier Properties/LP/ 111/ Shurtleff Financial Center, a partnership, Frontier Properties/LP/102/Meadow Glen Arms/79, a partnership, Frontier Properties /LP/119 Morton Meadow Arms/80, a partnership, Lemon Grove Arms Properties, a partnership, Lexington Arms Properties, a partnership, Broadway Arms Properties, a partnership, M. Irene Galarneau, Anthony S. Vigeon, Helena G. Vigeon, J. Avril Jesperson, Vincent R. Ciruzzi, Canice G. Ciruzzi, Victor V. Schloesser, Lynne D. Schloesser, James D. Bench, Marion G. Bench, David L. Ramsay, Willa D. Ramsay, Irving C. Olson, Florence J. Olson, Anne R. Behenna, Fred D. Snyder, Betty D. Snyder, Warren R. Young, Robert L.

Chambers, Pamela L. Chambers, David H. Dunlap, Beverly B. Dunlap, Watson Lunt, Stephanie Lunt, Howard D. Dunlap, Carol A. Dunlap, Roy Hastings, Edna Hastings, Dennis Jeager, Diann Jeager, William Kerr, Suzanne Kerr, Barber G. Lewis, Shirley Lewis, Michael Pobat, Anthony Terrizzi, Patricia Terrizzi, Emma J. Kemp, William Mahaffey, S. Rutherford, Waddy W. Bacon, Ann E. Bacon, R. Burningham, Rosalie Ross, Maurus W. Beatty, Dee Ann M. Beatty, Erma L. Beidler, Kathleen M. Borer, Steven R. Borer, James M. Caraher, Ann E. Caraher, Berlyn J. Cook, Eleanor R. Cook, Howard T. Ferguson, Rose L. Ferguson, Clarence W. Ginos, Myrna R. Ginos, Douglas L. Hallett, Arlene J. Hallett, James C. Holmes, Jessie M. Holmes, Ernest J. House, Patricia J. House, John B. LaJoie, Mary E. LaJoie, George Navarro, Alma Navarro, Ronald D. Scott, Renee M. Scott, Lana L. Neuman, Edward S. Murawsky, Helen L . Murawsky,

Sterling R. Price, Donald W. Searles, Barbara L. Searles, Carol A. Schloo, Scott R. Stell, Sandy J. Stell, Sonja S. Echt, Nettie Dutky, Arthur C. Thurber, Isabel P. Thurber, William H. Walters, Doris I. Walters, Robert O. Doran, Corrine Doran, Ralph Cordova, Antonia Cordova, Barbara Spatofore, Ronald F. Short, Joan E. Short, Harvey J. Westfall, Helen Westfall, Betty Wojciechowski, Robert E. Sackett, Audrey J. Sackett, Henry F. Chess, Adella Chess, Glenn Vechitto, Sally Vechitto, Joseph W. Actis, Rita M. Actis, Joy H. Crane, Peter R. Mathewson, Penny E. Mathewson, John P. Hennessey, Lorraine M. Hennessey, Charles R. Calhoun, Virgina A. Calhoun, Raymond E. West, Anna Marie Fusco, Louis W. Matthews, Sharon J. Matthews, Clarence P. Broadfoot, Mary A. Broadfoot, and John M. Ross

APPELLEES: Lewis Warren Shurtleff, also known as Lewis W. Shurtleff, Individually and doing business as Lewis W. Shurtleff,

Inc. and Frontier Properties, Inc., Frontier Properties, Inc., a corporation, Lewis W. Shurtleff, Inc., a corporation, Mary Alice Shurtleff, Thomas D. Elliott, Individually and as the Bankruptcy Trustee For Lewis W. Shurtleff, Inc. and Frontier Properties, Inc., Joel C. Estes, Kevin J. Hoyt, Estes & Hoyt, A.P.C., Kenneth W. Kinzel, Judith R. Kinzel, Donald Merkin, Kenman Corporation, Laura Lee Littleton, Cornell Steward & Associates, 535 Broadway a partnership, David A. Lien, Muriel M. Lien, Alan L. Bailey, Coldwell Banker Commercial Realty Services, a corporation or association, First Interstate Bank of California, a banking corporation, Fidelity National Title Insurance Company, a corporation, The United States of America, and Does 1 to 100, Jointly and Severally.

Rule 28.1: The names of parent companies, subsidiaries, or affiliates of corporate parties are not known.

II

OFFICIAL & UNOFFICIAL REPORTS

Appellants appeal from the orders and judgments in the following cases:

CA NOS. 83-6104, 83-6105 & 83-6148:

An Order filed on June 14, 1984.

CA NO. 83-6160:

An Opinion filed on June 25, 1984.

DC NO. C82-1246 & 3048:

An order filed on July 19, 1983.

A Memorandum Of Opinion filed on March 14, 1984 by the bankruptcy court.

DC NO. 83-0855-E(I):

Findings Of Fact And Order and a Judgment entered on August 12, 1983.

III

GROUNDS FOR JURISDICTION

(A) Date of judgments appealed:

(1) CA Nos. 83-6104, 83-6105, and 83-6148: June 14, 1984.

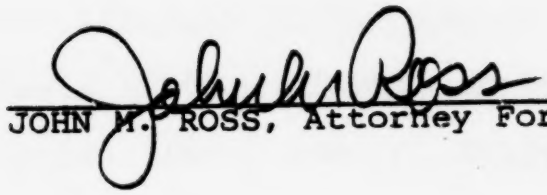
(2) CA No. 83-6160: June 25, 1984.

(B) Statutory basis of jurisdiction is

believed to be 28 USC 2101(a), (b), & (c).

. . . .

Date: September 10, 1984



JOHN M. ROSS, Attorney For Appellants

PROOF OF SERVICE

JOHN M. ROSS declares as follows: I am an attorney licensed to practice law before this court and I served the following document(s) by depositing a copy of each document in a separate sealed envelop addressed to each person named below and by depositing said envelop(s) with the U.S. Postal Service at San Diego County, CA on the date(s) indicated below with first class postage therefor prepaid.

DOCUMENT(S) SERVED:

Notice of Appeal And Jurisdictional Statement.

PERSON(S) SERVED:

Clerk, U.S. Court of Appeals For The Ninth Circuit, Box 547, San Francisco, CA 94101

Clerk, U.S. District Court, 940 Front St., San Diego, CA 92189

Clerk, U.S. Bankruptcy Court, 940 Front St., 5-N-17, San Diego, CA 92189

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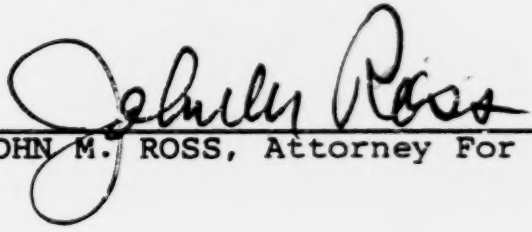
Solicitor General, Department of Justice, Washington, D.C. 20530

The originals of said pleadings were mailed to the addressees on September 11, 1984. Revised copies of said pleadings submitted pursuant to Rule 33.7 of the Rules of the United States Supreme Court were mailed to said addressees on October 17, 1984.

Executed at San Diego County, California on October 17, 1984



JOHN M. ROSS, Attorney For Appellants

Office-Supreme Court, U.S.
FILED
NOV 16 1984
ALEXANDER L. STEVAS,
CLERK

(4)

CASE NO. 84-658

In the Supreme Court

OF THE

United States

OCTOBER 1984 TERM

LEWIS W. SHURTLEFF, INC., and
FRONTIER PROPERTIES, INC.,
Debtors.

THOMAS D. ELLIOTT, etc., et al.,
Appellees,

vs.

FRONTIER PROPERTIES LP 123, etc., et al.,
Appellants.

FRONTIER PROPERTIES LP 101, etc., et al.,
Appellants,

vs.

LEWIS WARREN SHURTLEFF, et al.,
Appellees.

STANDING COMMITTEE ON DISCIPLINE, etc.,
Appellees,

vs.

JOHN M. ROSS,
Appellant.

On Appeal From The United States Court of Appeal For The Ninth Circuit

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

MACDONALD, HALSTED & LAYBOURNE
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4 pp

CASE NO. 84-658

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OF THE

United States

OCTOBER 1984 TERM

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THOMAS D. ELLIOTT, etc., et al.,
Appellees,

VS.

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Appellants.

FRONTIER PROPERTIES LP 101, etc., et al.,
Appellants,

VS.

LEWIS WARREN SHURTLEFF, et al.,
Appellees.

STANDING COMMITTEE ON DISCIPLINE, etc.,
Appellees,

VS.

JOHN M. ROSS,
Appellant.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

Pursuant to Rules 16.1(a) and (c) of this Court, Joel C. Estes moves to dismiss the appeal, or alternatively, affirm the judgments sought to be reviewed.

FACTS

As set forth in Appellants' jurisdictional statement, this is an appeal from one order and a separate judgment entered by the United States Court of Appeals for the Ninth Circuit. The order was entered on June 14, 1984 and dismissed the appeals in three civil actions. In its order the Court of Appeals dismissed the appeals on the grounds, *inter alia,* that Appellants' counsel failed to prosecute the appeals in a timely manner. That Court further suspended Appellants' counsel from practice before the Court of Appeals. Judgment was entered on June 25, 1984, affirming the lower court order which had suspended Appellant's counsel from practice before the District Court.

ARGUMENT

This appeal should be dismissed. Rule 16.1(a) states:

> The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because it is not taken in conformity with statute or with these rules.

28 U.S.C. Section 1254 provides:

> Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By appeal by a party relying on state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant on the review on appeal shall be restricted to the Federal questions presented; . . . .

Appellants have not petitioned for certiorari; the Court of Appeals did not hold any state statute unconstitutional. Therefore, this appeal should be dismissed as either beyond this Court's jurisdiction or not taken in conformity with statute.

In the alternative, the judgments entered below should be affirmed. Rule 16(c) provides that:

> The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In this case an order was entered on the ground that Appellants failed to prosecute their appeals and on the ground that their attorney failed to obey the court's rules. The ensuing judgment merely affirmed an order suspending Appellants' counsel from practice. Under these circumstances, it is manifest that the questions raised by this appeal are so unsubstantial they need no further argument.

CONCLUSION

This appeal is not authorized by law. Moreover, the questions raised by the Court of Appeals' Order and Judgment are manifestly unsubstantial. Accordingly, the appeal should be dismissed, or in the alternative, the order and judgment should be affirmed.

Respectfully submitted,

CHARLES H. DICK, JR.
Attorney for Joel C. Estes

MACDONALD, HALSTED &
LAYBOURNE
of counsel

Office - Supreme Court, U.S.
FILED
NOV 20 1984
ALEXANDER L. STEVAS
CLERK

Case No. 84-658

IN THE UNITED STATES SUPREME COURT

October 1984 Term

In re:	)
	)
LEWIS W. SHURTLEFF, INC., and FRONTIER PROPERTIES,	)
	)
Debtors.	)
	)
	)
THOMAS D. ELLIOTT, TRUSTEE,	)
	)
Appellee.	)

APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

Joel C. Estes, Esq.
Estes & Hoyt, APC
1010 Second Avenue, Ninth Floor
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(619) 234-2111

Attorneys for Appellee

IN THE UNITED STATES SUPREME COURT

In re:	)	No. 84-658
	)	
LEWIS W. SHURTLEFF, INC., and FRONTIER PROPERTIES,	)	
	)	
Debtors.	)	
	)	
	)	
THOMAS D. ELLIOTT, TRUSTEE,	)	
	)	
Appellee.	)	
	)	

APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

Pursuant to Rules 16.1(a) and (c) of this Court, Thomas D. Elliott, Appellee, moves to dismiss the above-numbered appeal, or alternatively, affirm the judgments sought to be reviewed.

Appellee joins in and hereby adopts the Appellee's Motion to Dismiss or in

the Alternative to Affirm the Judgments filed herein on behalf of Appellee Joel C. Estes

Respectfully submitted,

_____

Joel C. Estes, Attorney for
Thomas D. Elliott, Appellee

Estes & Hoyt, A Professional Corporation
of counsel

IN THE UNITED STATES SUPREME COURT

In re:	)	No. 84-658
	)	
LEWIS W. SHURTLEFF, INC., and FRONTIER PROPERTIES,	)	
	)	
Debtors.	)	
	)	
	)	
THOMAS D. ELLIOTT, TRUSTEE,	)	
	)	
Appellee.	)	
	)	

AFFIDAVIT OF SERVICE BY MAIL

I, Paula Prochazka, declare:

On November 16, 1984, I served APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS as follows:

Clerk, U.S. Court of Appeals For The Ninth Circuit, P.O. Box 547, San Francisco, CA. 94101

Clerk, U.S. District Court, 940 Front Street
San Diego, California 92189

Clerk, U.S. Bankruptcy Court, 940 Front Street
San Diego, California 92189

Donald Merkin, Esq.
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San Diego, California 92108

Mr. John Ross
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San Diego, California 92119

Thomas D. Elliott
511 First Avenue, Suite 207
Encinitas, California 92024

Kevin T. Wirsing, Esq.
101 West Broadway, Suite 1200
San Diego, California 92101

by depositing copies of the document in a separate sealed envelope addressed as above-

indicated and by depositing said envelopes in the United States mail at San Diego, California, on the date of this Affidavit.

Paula Prochazka

Paula Prochazka

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On November 16, 1984, before me, the undersigned, a Notary Public in and for said State, personally appeared Paula Prochazka, personally known to me to be the person whose name is subscribed to the within Affidavit and acknowledged that she executed same.

Laurie J. Smith

Laurie J. Smith, Notary Public

OFFICIAL SEAL
LAURIE J. SMITH
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
MY COMMISSION EXPIRES SEP 27, 1985

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(3)

Office-Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS, CLERK

CASE NO. 84-658

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER 1984 TERM

Lewis W. Shurtleff, Inc., and
Frontier Properties, Inc.,
Debtors,
Thomas D. Elliott, etc., et al.,
Appellees,
vs.
Frontier Properties LP 123, etc., et al.,
Appellants.

Frontier Properties LP 101, etc., et al.,
Appellants,
vs.
Lewis Warren Shurtleff, et al.,
Appellees.

Standing Committee On Discipline, etc.,
Appellees,
vs.
John M. Ross,
Appellant.

On Appeal From The United States
Court of Appeal For The Ninth Circuit

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

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15 pp

CASE NO. 84-658

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER 1984 TERM

Lewis W. Shurtleff, Inc., and
Frontier Properties, Inc.,
Debtors,
Thomas D. Elliott, etc., et al.,
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On Appeal From The United States
Court of Appeal For The Ninth Circuit

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENTS

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INTRODUCTION

Appellee Donald Merkin, pursuant to Rules 16.1(a) and (c) of the Rules of the Supreme Court of the United States, hereby moves the Court to dismiss the appeal herein, on the grounds that 1) The appeal is beyond this Court's jurisdiction, 2) The appeal is not taken in conformity with statute. Alternatively, appellee moves the Court to affirm the judgment and order appealed from, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

FACTS

As set forth in appellants' jurisdictional statement, this appeal is taken from an order and a separate judgment entered by the United States Court of Appeals for the Ninth Circuit. The order was entered on July 14, 1984, and is set

forth in the Appendix to appellants' jurisdictional statement at page 51. In that order, the Court of Appeals dismissed three appeals (nos. 83-6104, 83-6105 and 83-6148) because of appellant's failure to comply with the rules and orders of that court (referred to herein as the "order").

The judgment appealed from, entered by the Court of Appeals on June 25, 1984, is reported at 735 F.2d 1168, and is set forth in the Appendix to appellants' jurisdictional statement at page 84. That judgment, or appeal no. 83-6160, affirmed an order of the District Court for the Southern District of California suspending appellants' counsel from practice before it (referred to herein as the "judgment").

ARGUMENT

This appeal is wholly without merit. It is another attempt by these appellants, in a series of attempts, to delay and obfuscate these proceedings. By their

rather lengthy jurisdictional statement, appellants seem to be appealing on the "merits" of their case. But a closer look at the record reveals that the cases relating to the order were never brought before the Court of Appeals on their merits. Appellants failed to comply with the rules of that court and their appeal was dismissed. That is the order from which they now appeal.

The judgment from which appellants appeal is a judgment affirmed by the Court of Appeals disciplining appellant's attorney, John Ross, Esq. The record will bear out numerous instances of conduct by Mr. Ross which support the Court's judgment. The authority cited below clearly shows that this appeal should be dismissed.

I

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THIS COURT'S JURISDICTION, AND IT IS NOT TAKEN IN CONFORMITY WITH STATUTE

Rule 16.1(a) of the Rules of this Court provides that a motion to dismiss an appeal can be made on the ground that the appeal is not within the Supreme Court's jurisdiction, or because the appeal is not taken in conformity with statute. Such grounds exist here.

The proper cases for review of the decisions of the Court of Appeals are set forth in 28 U.S.C. Section 1254, which provides in part:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
>
> 1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:
> 2) By appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the

Constitution, treaties or laws of the United States..."

As stated above, the appellants have appealed from an order and a judgment entered by the Court of Appeals (not by writ of certiorari). Neither the order nor the judgment held any state statute to be invalid. Thus, this appeal should be dismissed as beyond this Court's jurisdiction, and as not taken in conformity with statute.

II

THE ORDER AND JUDGMENT APPEALED FROM SHOULD BE AFFIRMED BECAUSE THE QUESTIONS PRESENTED ARE SO UNSUBSTANTIAL AS NOT TO MERIT FURTHER ARGUMENT

In the event the Court were to construe this appeal as a petition for a writ of certiorari, sufficient grounds for dismissal still exist:

Rule 16.1(c) of the Rules of this Court provides that a motion to dismiss can be made on the ground that it is manifest that the questions on which the decision of

the cause depends are so unsubstantial as not to need further argument.

In their jurisdictional statement herein, Appellants assert twelve issues to be decided on appeal. However, the first ten issues asserted, relate to the merits of Appellants' appeals below. Since the appeal herein is from the order and judgment described above, the issues in this appeal relate only to that order and judgment and not to the merits of the case. The issues properly are: (1) The propriety of the dismissal of appeals below for noncompliance with the lower court's rules and orders, and (2) the propriety of the lower court's affirmation of the disciplinary order of the District Court.

A. The Court of Appeals acted properly in dismissing the appeals before it for failure to comply with that court's rules and orders.

As discussed above, the appeal herein

is taken in part from an order of the Court of Appeals for the Ninth Circuit, dismissing three appeals for failure to comply with the rules and orders of the Court. In its order, the Court specified those failures as: (1) Failure to file the opening briefs, (2) late submission of briefs that did not conform with court rules, (3) repeated filing of untimely motions, and (4) misrepresentations to the Court regarding the prosecution of the appeals. In addition to dismissing the appeals, the Court of Appeals found those failures to be sufficient to justify the suspension of Appellants' counsel from practice before it.

In taking such action, the Court of Appeals relied on its own Rule 19(b), which provides:

> "When an appellant **fails** to file a timely record, pay the docket fee, file a timely brief or otherwise comply with rules requiring processing the appeal

> for hearing, **the Clerk will enter an order dismissing the appeal.** In the event of such a dismissal, the Court may also impose disciplinary and monetary sanctions on those responsible for prosecution of the appeal..." U.S. Ct. of App. 9th Cir. Rule 19(b) (Emphasis added).

Authority for that sanction may be found in the Rules of Appellate Procedure, Rule 31(c) of which provides in part:

> "If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal..."
> Fed. Rules App. Pro. 31(c)

The power to dismiss appeals has long been recognized in the Ninth Circuit, and affirmed by this Court:

> "Where...the brief for an appellant exhibits a gross disregard of the requirements of our rules, a dismissal of his appeal is warranted."
> Thys Company v. Anglo California National Bank
> 219 F.2d 131, (9th Cir. 1955), cert. denied 349 U.S. 946, rehearing denied 350 U.S. 855.

Rule 46(c) grants to the Courts of

Appeal the power to discipline attorneys who practice before them for failure to comply with any rule of the court. Fed. Rules App. Pro. 46(c).

Thus, the Court of Appeals had the power to dismiss the appeals for the grounds stated, and to discipline Appellants' counsel. The question of law is unsubstantial and the order should be affirmed.

B. The Court of Appeals acted properly in affirming the disciplinary order of the District Court.

In its judgment entered June 25, 1984, the Court of Appeals affirmed the order of the District Court suspending Appellants' counsel from practice before it. The Court of Appeals based its decision on the power of the District Court to discipline attorneys who practice before it.

> "It is elementary that any court...which has the power to admit attorneys to practice has

> the authority to disbar or discipline attorneys for unprofessional conduct."
>
> Koden v. U.S. Dept. of Justice 564 F.2d 228, 233 (7th Cir. 1977)

The District Court is required to exercise and regulate that power by sound and just judicial discretion but the findings of fact in support of such an order will not be overturned unless clearly erroneous. Levenson v. Mills 294 F.2d 397, 398 (1st Cir. 1961) cert. denied, 368 U.S. 954 (1962)

No showing was made below that the District Court's findings were clearly erroneous. The Court of Appeals acted properly and there is no need for further argument. The judgment below should be affirmed.

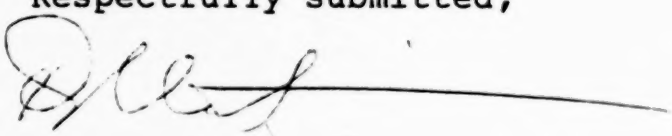
CONCLUSION

This appeal is not authorized by law and whether treated as a petition or writ of certiorari or not, it is manifest that

the questions raised are so unsubstantial that they need no further argument. Thus, for the foregoing reasons, this appeal should be dismissed, or alternatively, the judgment and order appealed from should be affirmed.

Dated: November 20, 1984

Respectfully submitted,



Donald Merkin